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ABSTRACT

To promote a good living/learning environment, it is important for institutions to review their student discipline processes and policies regularly. Many members of the campus community may play a part in reviewing student discipline policies, including public affairs spokespeople, faculty and staff throughout the institution, student affairs personnel, students themselves, and--last but not least--the institution's attorneys. In fact, legal counsel must be involved in reviewing disciplinary policies because students who have been sanctioned for misbehavior often bring lawsuits against institutions. Involving legal counsel in the review process can help prevent institutions from being sued in the first place and can help them prevail in lawsuits that do come before the courts. Attorneys can also help to correct common misperceptions about student discipline processes. By participating in the review process, institutional counsel can ensure that student discipline policies steer clear of criminal law references and promote living and learning environments for students. A thorough review of student discipline policies will cover specific areas, such as where the institution's rules apply, who determines whether a student broke the rules, and who decides on sanctions. It will address the role of attorneys in student discipline, as well as how to handle appeals of disciplinary sanctions. The student discipline policies that result from such a systematic review will help nurture the living/learning environment on campus, while preserving students' rights and reinforcing their responsibilities. (MKA)

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Reviewing your Student Discipline Policy: A Project Worth the Investment

by

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Reed Smith Shaw & McClay

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NASPA
Student Affairs Administrators in Higher Education

Reviewing Your Student Discipline Policy:

A Project Worth the Investment

Does Your Student Discipline Policy Support Your Institution's Mission?

A student discipline policy can be a powerful tool for encouraging an environment in which students live and learn successfully. Regular reviews of the policy can ensure that it continues to support your institution's educational mission. Such reviews may limit the number of discipline-related lawsuits brought by students who receive sanctions for violating campus rules. They may also help college and university administrators prepare for defending any legal challenges that may arise.

As professionals in student judicial affairs dedicated to student development, the Association for Student Judicial Affairs believes that continuous review of policy and practice is essential. As a result, behavioral concerns can be addressed effectively from an educational perspective and student conduct standards can be fairly enforced.

Elizabeth M. Baldizan, Ed.D., President
Association for Student Judicial Affairs

Be motivated to read this. It explains in concise and non-legalese language how to make sure your student disciplinary process works within the guidelines established by the law to resolve problems and heal. The entire academic and student community benefits when the student disciplinary process works well.

Donald D. Gehring, Professor & Director
Higher Education Doctoral Program
Bowling Green State University

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Executive Summary

Officials and administrators at educational institutions have always been concerned about student discipline. In 1822, Thomas Jefferson, founder of the University of Virginia and its first student affairs officer, called the problem of student discipline "the most difficult in American education."

Like the University of Virginia in Jefferson's day, contemporary educational institutions attempt to regulate student conduct not just to prevent misbehavior, but also to foster a collegial environment in which students can live and learn productively. Thus, an effective discipline policy helps institutions to fulfill their educational missions. To promote a good "living/learning environment," it is important for institutions to review their student discipline processes and policies regularly.

Many members of the campus community may play a part in reviewing student discipline policies, including public affairs spokespeople (because student discipline proceedings often make news), faculty and staff from throughout the institution, student affairs personnel, students themselves, and — last but not least — the institution's attorneys.

In fact, legal counsel must be involved in reviewing disciplinary policies because students who have been sanctioned for misbehavior often bring lawsuits against institutions. Involving legal counsel in the review process can help prevent institutions from being sued in the first place and can help them prevail in lawsuits that do come before the courts.

Attorneys can also help to correct common misperceptions about student discipline processes. Many students (and the attorneys they sometimes hire when faced with the possibility of disciplinary sanctions) mistakenly believe that student discipline proceedings are like criminal trials, complete with judges, juries, and sentences. Numerous court decisions have held that criminal law is not a valid point of reference for student discipline, but lawyers for students who are not familiar with the academic environment often try to treat the process that way. By participating in the review process, institutional counsel can ensure that student discipline policies steer clear of criminal law references and promote behavioral standards that support a positive living and learning environment for all students.

A thorough review of student discipline policies will cover specific areas, such as where the institution's rules apply, who determines whether a student broke the rules, and who decides on sanctions. It will address the roles of attorneys in student discipline (if any), as well as how to handle appeals of disciplinary sanctions.

The student discipline policies that result from such a systematic review will help nurture the living/learning environment on campus, while preserving students' rights and reinforcing their responsibilities.

This paper was written by Edward N. Stoner II, a partner in the Pittsburgh office of UE Select Counsel firm Reed Smith Shaw & McClay, where he is chair of the firm's Higher Education Practice Group (412-288-3292). A widely published author and lecturer on student discipline, Stoner is also first vice president of the National Association of College and University Attorneys. He received a B.A. degree from DePauw University in 1969 and a J.D. degree from the University of Virginia in 1972. *The author wishes to thank former NASPA President, Dr. Dennis Golden, President of Fontbonne College, for his inspirational leadership on student affairs issues.*

Reviewing Your Student Discipline Policy: A Project Worth the Investment

Disciplining students presents some of the most challenging and potentially destructive issues that colleges face. Fortunately, administrators can help their institutions to prepare for discipline issues – and handle them better – by reviewing the student discipline policy with legal counsel. A well-designed policy keeps student discipline aligned with the institution's mission and its educational philosophy. It also respects the important differences between student discipline and the criminal process. By reviewing the policy with these principles in mind, administrators can limit the number and distractions of student discipline lawsuits and also can promote a good living/learning environment on campus for all students. These potential rewards make the review an effort well worth the investment.

The need to think carefully about college student discipline is not new. Thomas Jefferson, who founded the University of Virginia, also served as its first chief student affairs officer. In 1822, following student riots on campus, he wrote in dismay to a fellow college president that, "The article of [student] discipline is the most difficult in American education."[1] Today, no one needs to be convinced that college student conduct and discipline issues are serious, important, and challenging. Of course, dealing with the student misconduct is a difficult challenge by itself, just as it was in Jefferson's day, and it likely always will remain so.[2]

Today publicity concerns and increased involvement of attorneys representing students complicate the situation. Many student discipline situations now become "high visibility." Often the visibility results when a student does not keep confidential circumstances in which he or she is sanctioned for misbehavior. Regrettably, attorneys now appear frequently — threatening (or actually bringing) lawsuits that challenge college sanctions for student rules violations. This new attention to student discipline has resulted in misunderstandings. To some extent, these misunderstandings arise because colleges routinely do not respond publicly to the details of specific cases. Confidentiality provisions of federal law[3] and the belief that enforcing the

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[1] Jefferson continued: "Premature ideas of independence, too little repressed by parents, beget a spirit of insubordination, which is the great obstacle to science with us and a principal cause of its decay since the revolution. I look to it with dismay in our institution as a breaker ahead which I am far from being confident that we shall be able to weather." Letter dated Nov. 2, 1822, from Thomas Jefferson to Thomas Cooper, second President of South Carolina College, later renamed the University of South Carolina. *VII The Works of Thomas Jefferson* 268 (1884).

[2] This paper addresses student discipline policy in the higher education context. Readers are cautioned that its recommendations may not apply with equal force to primary and secondary schools. Public primary and secondary schools have, for example, constitutional due process obligations. *Goss v. Lopez*, 419 U.S. 565 (1975). Private K-12 institutions are best advised to develop — and then follow — a consistent discipline policy.

[3] The 1998 Higher Education Act amendments to FERPA (especially section 951) changed the confidentiality rules of FERPA in narrow contexts: where the offenses are "with respect to" or done by "an alleged perpetrator of" crimes of violence or nonforcible sex offenses or where disclosure is to parents of a student under age 21 who violates campus rules on alcohol or drugs. This is a very tricky area because the amendments do not *compel* disclosure but only remove the FERPA protection for students in a very narrowly defined way. For most campuses, even when this narrow law applies, the decision as to whether to release information is an educational policy one, not a legal decision. Great care is needed because the legal loophole in which one may release data is very narrow and fraught with danger. Public institutions in open records states may determine that, in some very special situations, they are now compelled to release information previously treated as confidential, but no information should be released under these amendments without careful consultation with

(continued pg. 4)

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college's rules within the confidential confines of the academic community has educational value lead schools to avoid public comment on specific discipline situations. The interpretations of events that defense attorneys, the media, sports fans, and other interested parties advance, which may or may not reflect the reality of the situation, put pressure on the student discipline process.[4] One response is to explain campus policies generally but this approach, by itself, does not completely resolve misunderstandings that arise in specific cases.

When these pressures combine with a discipline process which is itself not up-to-date, the institution faces two risks: poor *ad hoc* decision making and, even if the decision itself is sound, lawsuits that focus on alleged procedural irregularities rather than the behavior of the students. In fact, in most cases in which a court has overturned student discipline, the college failed to follow its own process and did something else instead! Clearly then, we want a process that we are proud to follow, even in hard cases, so we can avoid poor *ad hoc* decision making.

Fortunately, if the college's lawyers and student affairs officials invest time and effort in a careful review of campus discipline rules, they can reduce these risks. Their review has two goals.

First, it makes sure that the discipline rules are both well crafted – easy to read and to understand – and complete. The rules should include a statement of student rights and responsibilities that reflects the institution's values and its efforts to create for students a positive living/learning environment. They should also set forth the process used to enforce the rules.

Second, the review prepares for a possible student legal challenge to sanctions imposed for violation of the college's rules. This review and preparation enable the college's attorney to defend the discipline process and results confidently and successfully. In the best of all worlds, defense counsel can use this preparation to convince the opposing counsel not to bring a threatened lawsuit after all.

Making Effective Use of the Institution's Attorney

If you want to improve your attorney's ability to defend student discipline processes and sanctions, involve that attorney well in advance of a dispute. Here are several checkpoints on attorney involvement in the student discipline process.

1 Identify the attorney(s) who will defend you if a student threatens to bring a lawsuit about student discipline.

2 Involve the attorney(s) in the process of reviewing and, when necessary, redrafting the student discipline policy, or "Student Code," as it is often called. The attorney need not attend every session, but should have the opportunity to point out alternatives that, on the one hand, are both legal and easier to defend and, on the other, support the objectives of the student affairs professionals. Participation in this review will make your attorney more knowledgeable about the process and its goals, more committed to defending the policy, and more effective in communicating about the process, whether to opposing counsel or a judge.

3 Have your attorney attend a student discipline hearing. Do this before there is a legally contested case. This will enhance the

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(Continued from pg. 3)
campus counsel. A good starting point for analysis is contained in the "Reed Smith Higher Education Forum" (Fall 1998) which may be accessed on the World Wide Web at www.rssm.com/pubs/education/fall98.html.

[4] For a discussion of some of the issues involved here, see the article written by this author and Sheldon E. Steinbach, vice president, general counsel and secretary of the American Council on Education, "The Truth About College Discipline," *The Chronicle of Higher Education*, Dec. 13, 1996 (see www.rssm.com/pubs/other/stoner1.html).

attorney's understanding of the process and his or her ability to defend it. It also will enable your attorney to make additional suggestions about the process from observing how it actually works.

4 Annually, ask your attorney if there have been any new laws or court decisions that impact your policy or rules. This way, you and your attorney will keep your policy and rules up-to-date.

5 Call your attorney as soon as a student threatens legal action and, together, consider your legal alternatives carefully. Such consultation may even enable your attorney to head off an ill-advised lawsuit.

6 Do not accidentally delegate to your attorney the decision-making process about what conduct the student engaged in or what the sanction should be. This happens, quite accidentally, when the attorney is asked, "What should I do now?" It is a mistake to substitute the attorney's legal training for the training of student affairs professionals on what is educationally valuable. So, instead of asking your attorney *what to do*, ask *what your legal alternatives are* and *what the legal consequences would be from each alternative*.

Revising Your Student Discipline Process

There are many issues that will come up as you evaluate and improve the student discipline process. Before considering substantive issues, however, consider the review process itself.

If the constraints of your college's social system and history allow, here are a few guidelines for this review and revision process.

1 Do it on a regular basis. This will enable you to make sure the process is responsive to current issues and behaviors and, with luck, it may also enhance your efforts to create the best possible living/learning environment. Doing a regular review every three years is one model.

2 Gather background information, such as the numbers and locations of various types of rules violations. Pay particular attention to any procedural problems or ambiguities in the policy that may have caused problems in the past.

3 Keep the actual committee that revises the policy relatively small, so that it can work effectively. The members should include student affairs administrators, students, and your counsel. Also include, or at least interview, those who conducted hearings during the most recent academic year.

4 Involve representatives of other campus constituencies in the process by asking each one to send a representative to a single meeting as a special guest of the committee.[5] This way, the invited constituencies can share their concerns and come to understand the goals of the process without making the formal committee too large. Among the many constituencies to consider inviting, two should not be overlooked: the campus media spokesperson and the athletics director. Each has a special need to understand what the policy is and how the policy works.

5 Gather and review all codes of conduct that exist at the institution. You may find that various schools (e.g., professional schools) and departments (e.g., athletics) may have their own standards in addition to the institution's basic student discipline policy. The review process should provide that these policies do not conflict but, rather, compliment each other.

6 When the process is completed, consider educating top administrators who were not actually involved in the review and pertinent board members about the values that the student

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[5] For a more detailed discussion of the review process, see Stoner E., "A Model Code for Student Discipline," *The Administration of Campus Discipline: Student, Organizational and Community Issues*, 8-11, College Administration Publications Inc.(1998).

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discipline policy reinforces and the policy's critical role in sustaining a quality living/learning environment for students.

7 Focus on mediation, as most incidents of misbehavior are resolved short of a more formal hearing.

The Model Student Code

A model student disciplinary code that appeared in the fall 1990 edition of *The Journal of College and University Law* may be useful as a checklist to consult during your review. (E. Stoner & K. Cerminara, "Harnessing the 'Spirit of Insubordination': A Model Student Disciplinary Code," 17 J.C.U.L. 89. A copy of the Model Code may be obtained by sending an e-mail request to enstoner@rssm.com.)

The Philosophical Divide:
The Living/Learning Environment and Confusion About Criminal Law

Student discipline policy issues divide into two somewhat overlapping categories: questions that are philosophical in nature and those that are more "nuts and bolts."

At one point or another, all student discipline controversies involve discussion of the educational philosophy behind disciplining students for violating the college's rules. This is appropriate and helpful. But, almost invariably, discussions about student discipline begin to sound like discussions of criminal law. This unfortunate situation is often compounded by misunderstandings about criminal law and why criminal principles are the wrong perspective from which to understand a college's efforts to deal with student misconduct.

The Living/Learning Environment

Before we discuss why criminal law purposes and standards are *not* the proper measure of student discipline standards, it is important to remember the real purpose of campus standards. It is to create the best environment in which students can live and learn. Indeed, this purpose motivates many actions of student affairs professionals, whether they are conducting positive educational programs and activities or disciplining students.

The concept of creating the best possible living/learning environment is not a new one. When Thomas Jefferson established the University of Virginia in Charlottesville, he strove to create an environment far different from the one students came from at home, in the small villages and farms of rural Virginia. He envisioned an environment in which all students had the best chance to learn, to study, and to grow, not only as scholars but also as citizens of the young republic. That remains the goal of student affairs professionals a century and three-quarters later.

At the cornerstone of this effort to create the best possible living/learning environment is the obligation of students to treat all other members of the academic community with dignity and respect – including other students, faculty members, neighbors, and employees of the college. That is a hallmark of a sound student discipline system and from it springs a touchstone important for college lawyers and administrators alike: Treat all students with equal care, concern, dignity, and fairness.

Although this principle may seem obvious, it merits repeating. For example, when a situation involves a fight, a sexual assault, or other student-on-student violence, this principle helps us to remember that *student victims are just as important as the student who allegedly misbehaved*. Dedication to treating each student with *equal* care, concern, dignity, and fairness creates a far different system than a criminal system in which the rights of a person facing jail time are superior to those of a crime victim. By contrast, under the academic discipline system, the misbehaving student, any victims, and their fellow students each have equally important interests that the discipline process takes into account in order to reach a fair resolution. Each is entitled to live in the best possible living/learning environment and the enforcement of campus rules is critical to the existence of such an environment for *all* members of the academic community.

Cases of student-on-student violence raise many of the most difficult student discipline issues. In

resolving these issues, the principle that all students are treated with equal dignity, care, concern, and fairness is critical. Considering in a particular case whether the institution's policies and actions uphold this principle provides a balanced perspective on whether the student discipline process is well designed and meeting its objectives. Moreover, using this principle as a touchstone will prevent the institution from undermining its own standards — which can happen if the college inadvertently treats the allegedly misbehaving student as more important than students who claim they were victims or who simply want to live and study on a campus in which rules of civil behavior are respected and enforced fairly.

The Criminal Law

Criminal law is not a valid point of reference for student discipline issues – except by contrast.

The confusion on this issue comes from two principal sources, one innocent and the other not innocent at all. The innocent source is that the same act may result in several different types of responsibility. For example, a drunk driver who causes an accident may have criminal responsibility (e.g., manslaughter if someone is killed) as well as civil responsibility for money damages and civil administrative responsibility (losing one's driver's license). If the drinking occurred at college, the student may, in addition, have a fourth responsibility: discipline under the student conduct code for violating the rules that support the living/learning environment on campus. None of these areas of responsibility pre-empts any other, nor do the process or procedural rules from one system apply to the other systems. Yet, because criminal cases receive such detailed coverage on television, many people think only of criminal law standards and conclude that they pre-empt the field. That is simply incorrect.

The other source of confusion is that lawyers defending students against charges of violating college standards attempt to use criminal law strategy and tactics in disciplinary proceedings. When a lawyer's strategy is to derail the student discipline process, he or she will typically use the time honored criminal law tactic of delay. "This is (or might be) a criminal case," the lawyer argues. "Therefore, the college should do nothing until the criminal law matter is resolved." The lawyer who uses that legal tactic does so because he or she desperately wants to avoid dealing with the one issue the student discipline system must address: What did John or Jane do and, if he or she did violate institutional standards, what is the appropriate sanction? The lawyer for a student accused of violating college standards hopes that delay will lead to the matter being forgotten or to witnesses graduating or not returning to school. This tactic may work in criminal court, but we should not allow it to deflect us from carrying out the student discipline process, which is an integral part of the support system for the living/learning environment on campus.

In short, a college may well regret delay in resolving an alleged violation of a college's rules because the criminal law was in the picture. In any event, such delay is not compelled as a legal matter and there are good arguments that it also is bad policy.

As a legal matter, student discipline codes are not criminal law codes and criminal law concepts do not apply to them. Only the government can impose criminal sentences of jail time or a criminal fine. No college student discipline system can impose criminal sanctions.[6] Indeed, the most severe sanction a college can impose is expulsion of a student. A college cannot jail or criminally fine a student, no matter what college rule the student has violated. Thus, criminal law principles simply are irrelevant to the college's application of its standards of behavior for students.

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[6] Military service institutions which operate, in part, under the Uniform Code of Military Justice provide a different and contrasting model.

Mr. Justice Harry A. Blackmun emphasized this clear legal point when he was an appellate court judge. "School regulations," the future Supreme Court Justice wrote, "are not to be measured by the standards which prevail for criminal law and for criminal procedure." *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1088-89 (8th Cir. 1969).

Three recent cases emphasize that Justice Blackmun's statement remains good law.

In *State v. Sterling*, 685 A.2d 432 (Sup.Ct. Maine 1996), a college sanctioned a football player for assaulting a teammate. When criminal charges were also brought, the trial court dismissed the criminal charges on the grounds that the college sanction plus criminal charges would be "double jeopardy." On appeal, the Maine Supreme Court reversed, ruling that the criminal matter could proceed and that there were not two criminal proceedings at all, so there was no double jeopardy. In addition, that court added what all college administrators know: that it is "essential to the integrity of a university that students at that university observe its code of conduct." The college's sanctions, the court ruled, were "remedial," to protect both the institution and its athletic program. It was not correct to apply criminal law concepts to college discipline.

In 1997, the criminal court in Oklahoma reiterated the point as well. In *State v. Kauble*, 948 P.2d 321 (Ct.Crim.Appls. Okla. 1997), a student who falsely reported a car-jacking to university police pled "guilty" to the student code charge and received university disciplinary sanctions. As in *Sterling*, a trial court ruled it would be "double jeopardy" to proceed with a criminal charge, but the appellate court reversed. The appellate court explained that the college's actions were not part of the state's criminal law system and that, by contrast, the university's purposes were to "protect the integrity of the university and its resources," to rehabilitate the responsible student, to help him graduate, and to protect other students.

Similarly, in a case decided in 2000 in a United States District Court, the Judge not only held that FERPA gives confidentiality protection to student discipline records, but he also noted that student disciplinary proceedings "are not criminal in nature as they only regulate the relationship between the student and the university, and have no bearing on a student's legal rights or obligations under state or federal criminal laws." *United States v. Miami Univ.*, _F.3d._, Case No. 2-98-0097 (S.D. Ohio, March 20, 2000) (Smith, J.).

Thus, when counsel for students charged with violating the institution's code of conduct try to convince you that criminal law concepts apply to student discipline proceedings (and try to delay those proceedings with the hope that no discipline will ever be imposed), you will be completely correct to say, "Our system does not intend to use criminal law concepts, and criminal law concepts do not apply to student discipline." If they ask, "Says who?" you may simply reply: "Justice Blackmun."

A college could, of course, voluntarily adopt the policy of not imposing student discipline if the conduct might also violate a criminal law or ordinance and might be the subject of a criminal prosecution. While this would be legal, there are a number of policy issues to consider before proceeding down that path. Here are a few:

1 Aside from minor residence hall infractions such as violating quiet hours for studying, virtually all student discipline is based upon misconduct that does overlap with some criminal law proscription. For example, the criminal code prohibits underage alcohol use, throwing things out windows, turning in false fire alarms, stealing property, fighting, hazing, dating violence, and other types of student-on-student violence. Adopting a policy of delay whenever conduct might violate a criminal standard will prevent the school from responding promptly to virtually all misconduct that undermines a positive living/learning environment.

2 The criminal law process is a slow one. Deference to it would mean that campus discipline standards would go unresolved for a long period of time. Worse, the criminal law often reaches no resolution at all because witnesses move away (or graduate) or become discouraged by the repeated delays or by the discomfort of being "put on trial" by criminal defense counsel. Thus, delay pending the completion of criminal processes is unlikely to result in prompt reinforcement of living/learning standards on campus. To the contrary, delay in enforcing the college's rules may mean that no one deals with the behavior, ever.

3 Criminal law standards were never intended to be standards for student behavior within an academic community. The positive living/learning environment that institutions seek to create for students is simply not a criminal law touchstone. In addition, the criminal law standard of requiring proof "beyond a reasonable doubt" is surely correct when we contemplate putting someone in jail, but when deciding what a student did and whether it violated campus rules, the appropriate standard is the "more likely than not" standard used in civil situations. Thus, the criminal law uses both different values and different standards of proof than are appropriate to providing students with a good living/learning environment on campus.

4 Prompt response to campus misconduct reinforces our values and delay does not. Deferral to criminal law process does not create campus conduct standards that support a quality living/learning environment. Instead, delay creates standards that mimic the environment in the society at large, and the quality of life on campus will suffer by being reduced to "the law of the street." By contrast, prompt response to campus misconduct helps to convince students that the institution is, indeed, committed to creating a quality environment for them. On every campus in this country, student leaders and student affairs professionals urge student victims of dating violence to come forward. This enables victims to get appropriate help and assists in improving the campus living/learning environment. Nothing undermines these efforts more, however, than a college's *ad hoc* decision not to take action due to confusion over the interplay with criminal law.

Having concluded that the criminal law standards are not the proper measure by which to establish or evaluate a student discipline process, we must take care not to confuse matters by using criminal law terminology in student discipline policy. Honest lay people reading a student discipline policy full of criminal law language may well be led to the mistaken conclusion that the policy describes a criminal justice system. Using criminal law words also encourages lawyers representing students accused of misconduct to argue that the campus process is a criminal law system and to conclude that, "therefore," criminal law loopholes unknown to college administrators pre-empt the enforcement of college student discipline.

The guidelines here are simple:

- Do not use criminal law words in student discipline. We do not have "defendants." Instead, we have "students" (and some are "accused of having violated college rules").
- We determine what conduct occurred by relying on "information," not "evidence."
- Even students who violate our standards are not "guilty." Instead, we hold them "responsible" for their behavior.
- A college imposes a "sanction" for misbehavior, not a "sentence."
- We do not have "prosecutors." We do have witnesses who come before fact finders who determine if the college's behavioral standards have been violated.

We are *very* careful to define in our own words as our rules behaviors that we prohibit. Similar

behaviors may also violate criminal standards such as underage use of alcohol, hazing, assault, battery, and other student-on-student violence. The fact that we have our own definitions enables us to say, correctly, that we are *not* enforcing the criminal law (we could not, even if we wanted to do so) but are enforcing *our own* living/learning standards.

Here Comes the Judge

Student discipline cases may eventually wind up before a judge, in either federal or state court. Usually, the court case arises when a student who has been charged with a violation of campus rules seeks an injunction to prevent the college from proceeding or from enforcing any sanctions against him or her. These situations are unpleasant and expensive and sometimes result in unfavorable publicity.

Judges, however, do not want to become "super chief student affairs officers." They want to defer to college administrators for several reasons. They have no training in student discipline; it is not their field. They are already busy with other legal matters and do not want or need additional cases about how college students behave. Like us, judges recognize that student-on-student misconduct cases (the most common kind that go to court) raise difficult issues and are not easy to mediate.

Fortunately, even in an expulsion case, the legal standards require a judge to do little more than verify that the student had notice of the college rules he or she is held responsible for violating, the student had an opportunity to be heard, and the college followed its own rules, providing that the rules were inside a very large ballpark of reasonableness.

We will avoid long legal entanglements if we have an understandable student discipline system that explains campus rules; we follow our system; and we provide the bare minimum of "process" to satisfy a judge that we could, and did, have a fair opportunity to determine what happened and whether our rules were violated.

This approach enables a judge to say, "Well, my review of a student discipline case is very limited. The college complied with its procedures. The procedures are easy to follow. It did find a violation of its rules. The sanctions are ones the college said it might impose and those sanctions are within the wide range of its educational discretion."

A good student discipline code — one that your college follows even in tough cases — enables a judge to reach that conclusion and to dismiss the injunction case against you.

Revising the Policy: Specific Issues

Many questions that arise in the process of revising your student discipline policy present alternative proper choices. Here are suggestions on how to handle them. These issues, and many more, are discussed in greater detail in the Model Code. Another source of valuable information is the outstanding four-day "Donald D. Gehring Institute" conducted each summer by the Association for Student Judicial Affairs.[7]

Jurisdiction

The college's policy should reflect where the college's rules apply. Special attention should be paid to the application of general rules to remote study locations, such as international locations. Typically, the college rules apply on all college premises and at all college activities, whether on or off-campus. More broadly, most colleges specifically reserve the right to apply their rules to any student behavior even when off-campus and unconnected to a school activity, if in the judgment of the chief student affairs officer the alleged conduct adversely impacts the college community or its objectives. Two courts' views of the propriety of such off-campus application of rules are typical:

> "Obviously, a college has a vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's character and fitness to be a member of the student body." *Kusnir v. Leach*, 64 Pa. Commw. 65, 69, 439 A.2d 223, 226 (1982).

> "An educational institution's authority to discipline its students does not necessarily stop at the physical boundaries of the institution's premises. The institution has the prerogative to decide that certain types of off campus conduct are detrimental to the institution and to discipline a student who engages in that conduct." *Ray v. Wilmington College*, 106 Ohio App.3d 707, 667 N.E.2d 39, 110 Ed. Law Rep. 1222 (Ohio App., 1995).

Who Decides What Happened?

Someone must decide whether a student did, indeed, violate the institution's rules. The college is free to choose from a wide range of alternatives. A dean may make the decision after a series of investigatory meetings; this alternative is typically used for offenses that would not lead to suspension or expulsion. Another alternative is to have fact finders, ranging from individual administrators to boards of various compositions (from all student, to mixed boards of students, administrators, and faculty), decide after a more formal hearing. A third approach is to have the chief student affairs officer assign a hearing officer or board on a case-by-case basis.

Many urge student involvement in the fact finding process. Students, the thinking goes, understand the conduct of their peers better than anyone else. Moreover, it is their living/learning environment that is affected by the discipline process, so it is important to have their involvement. The prior history at an institution often drives the selection of a fact finder and the fact finding process.

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[7] For further information, contact ASJA at P.O. Box 2237, College Station, TX 77841-2237; (409) 845-5262; asja@tamu.edu. See asja.tamu.edu.

Whatever choice the institution makes, it is most important to follow it consistently. When faced with a troubling case, do not abandon the process outlined in the student disciplinary policy.

Who Decides the Sanction?

Similarly, once the fact finder determines that a student's conduct has violated the college's rules, the policy must focus upon how the college determines what sanction to impose. Again, law does not dictate this; the college is free to choose the most educationally appropriate approach.

Practice varies greatly. At some institutions, the same person or board that determines whether a violation occurred also sets the sanction. At others, an administrator (who may or may not "vote" on the violation decision and may or may not listen to the deliberations) sets the sanction after a violation is found and, often, after receiving the non-binding recommendation of the fact finder. The latter approach has two advantages. It helps ensure that the college imposes consistent sanctions for similar offenses. Second, should litigation later ensue and drag on for some time, it means that there will be a college employee witness to explain the student discipline process and the results.

Advisers and Lawyers

Those concerned with student affairs often ask to what extent students facing disciplinary charges must be allowed to have an adviser present. Most colleges do permit students to have an adviser at the hearing, at the student's expense, provided that the adviser sits quietly in the hearing room and does not try to participate directly in the proceeding. Students often select attorneys to serve as advisors.

Even a student at a public institution has no right to be represented by an attorney in the manner he or she might be represented in a court of law.[8] At most, when criminal charges also are pending, the student has the right to have an attorney present to act only as an adviser. "We do not think [a student] is entitled to be represented in the sense of having a lawyer who is permitted to cross examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the functions of a trial lawyer." *Osteen v. Henley*, 13 F.3d 221 (7th Cir. 1993) (Northern Illinois Univ.).

When the situation involves an alleged student victim, most colleges allow both students the same rights to have an adviser.

The Record

We recommend that the institution make a single verbatim record of a disciplinary hearing and that the student code state that the record remains the property of the college.

Although there is no legal requirement that there be such a verbatim record, several considerations make the creation of a record, such as by a small cassette tape recorder, advisable.

Audiotapes are valuable for several reasons. After a hearing, the members of the campus judicial body may listen to the tape during their deliberations. This eliminates any differences in opinion among the members about who said what and facilitates a better decision-making process. When a student thinks about filing an appeal, an audiotape pre-empts the filing of certain frivolous appeals. The tape indicates which witnesses were called (and whether other witnesses were denied the opportunity to testify). It also indicates what questions witnesses were asked and whether the hearing board refused to allow additional testimony or questions. In short, the audio record will help to guarantee that appeals are about what really happened at the hearing.

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[8] *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978).

Moreover, if no verbatim record is made at the hearing, someone at the hearing level will have to keep meticulous notes of what is said and/or write a careful and perhaps lengthy "opinion" explaining the board's action so that appellate reviewers will, indeed, have something to review.

An audiotape is also useful during the appeal. Appellate reviewers may easily listen to the portion of a tape that pertains to an appeal to hear how the issue was actually handled at the hearing. If a result is challenged as lacking "sufficient" or "substantial" information, listening to the audiotape enables reviewers to appreciate that they are not making credibility decisions anew. Rather their task is to determine if there was information sufficient to support the conclusion of the fact finder, deferring to the fact finder's evaluations on credibility. Appellate reviewers may, sometimes, decide it is appropriate to listen to the entire tape of a hearing. While this may be time consuming, the availability of the tape will make the reviewers confident that they will be able to perform their function well.

In the final analysis, the use of an audiotape helps the process work more smoothly, frees judicial body members from meticulous note taking so they can concentrate on what is being said and the questions they wish to ask, and helps avoid lawsuits not based upon what really happened at the hearing.

Guidelines for Audiotaping

If your institution decides to audiotape hearings, here are a few pointers.

1 Test the tape recorder at the beginning of each hearing. Make sure the machine works and will pick up and record everyone who may speak.

2 Have the chair identify each speaker so subsequent listeners will know who is asking questions or giving responses.

3 Allow a student who is considering filing an appeal and his or her adviser to have post-hearing access to the audiotape. Provide this access in a room near the dean's office during normal business hours and preserve confidentiality with a rule that the tape itself may not be taken off premises. Keep a log of the time spent reviewing the tape so there will be no question that there was fair access. At some schools, a member of the dean's staff sits with a student and his or her adviser while they review the tape.

4 Make a copy of the tape, which should also remain in the dean's office. The duplicate ensures that someone does not erase the tape, "accidentally" or otherwise. Today's cassette recording machines make it easy to create a duplicate audiotape.

5 In order to preserve the confidentiality of the process, both the original and the duplicate audiotape remain the institution's property. No one, not even a student's attorney or other adviser, should be allowed to take the tape out of the dean's office or to make a dub of either tape. This is important to preserving the dignity of the process, too, because the process itself may be seriously undermined if students learn that testimony at a hearing was played later on as "entertainment" in living quarters on- or off-campus.

6 Do not permit court reporters or extra tape recordings at hearings. This policy not only helps to preserve the dignity and confidentiality of the process, but also deters lawyers from trying to give the process a "courtroom" atmosphere, rather than the atmosphere of an educational process.

7 An audiotape, like any college record, is subject to discovery or subpoena in a lawsuit. If a student subsequently files a lawsuit and makes a transcript of the audiotape for use in that suit, someone in student affairs can check the accuracy of the transcript against the tape at a very small cost compared to the exorbitant cost of obtaining a formal legal transcript.

Appeals—and "Remand"

After a hearing has been held and a decision reached as to whether a student should be found responsible for violating the institution's standards, the next questions are whether to allow for an appeal and, if so, how the appeal should work.

Most schools do allow for one level of appeal,[9] not only because that seems fair to almost everyone, but also because hearing officers or panels do sometimes err. In such a circumstance, it is better to allow the matter to be returned to the hearing level to ask additional questions, to call another witness, or otherwise to correct the error, than to wait for judicial intervention to correct the error. Moreover, having an effective appeals process helps to deter frivolous lawsuits – no judge is favorably impressed by an appeal that a lawyer brings to court, but that the student did not bother to pursue through an available internal process.

On the other hand, it is important to understand exactly what an appeal of the result of a student disciplinary hearing is and is not. Almost every institution defines and limits the types of appeals that may be heard. The four grounds set forth in the Model Student Code are the most typical:[10]

1 To determine whether the original hearing was conducted fairly in light of the charges and information presented, and in conformity with prescribed procedures. Procedurally the key elements are giving the complaining party a reasonable opportunity to prepare and present information that the Student Code was violated, and giving the accused student a reasonable opportunity to prepare and present a rebuttal of those allegations.

2 To determine whether the decision reached regarding the accused student was based on substantial information, that is, whether the facts in the case were sufficient to establish that he or she violated the Student Code.

3 To determine whether any sanctions imposed were appropriate for the violation of the Student Code which the student was found to have committed.

4 To consider new information sufficient to alter a decision or other relevant facts not brought out in the original hearing, because such information and/or facts were not known to the person appealing at the time of the original hearing.

On appeal, the reviewers typically consider only the verbatim audio record and papers used at the hearing. An exception might be made when additional information is needed to explain the basis of a claim of "new information." No testimony is heard on appeal. Witnesses give testimony at the hearing, not on appeal.[11] It is not up to appellate reviewers to decide whether they would have believed the same testimony that the hearing panel believed. Credibility determinations are solely the job of the persons who found the facts at the hearing and who heard the witnesses, observed their demeanor, and looked them in the eye. Rather the job of

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9 Some schools allow a second level of appeal, such as to the president of a smaller institution, in cases of expulsion or suspension. For such presidents, this can be an appropriate function but, again, it is appropriate for the code to reflect this level of appeal and the scope of presidential review.

10 Some schools limit appeals only to cases in which suspension or expulsion has been a sanction. Typically, these limits result from a heavy load of cases and a history of appellate abuse. It is an understandable choice, though not the only one.

11 Some processes allow for testimony on appeal. This is not, to a lawyer, an "appeal" but a brand new hearing or a "trial de novo." It is an awkward process because all witnesses must be recalled so that the second body can judge credibility. In student-on-student violence cases both the victim and the accused, as well as all witnesses, must repeat their entire testimony – unless the policy permits such one-sided testimony on appeal. A policy allowing only one student special treatment has little to recommend it.

BEST COPY AVAILABLE

appellate reviewers is merely to evaluate the grounds for appeal, listed above.

Similarly, students typically submit their appeals in writing and do not appear before appellate reviewers. There is a practical reason for this approach. In student-versus-student situations, it would not be fair for an appeals board to hear one student's side of a story without hearing the other student's side, as well as the testimony of the various witnesses. It is a slippery slope to allow one side to appear, and not the other – especially if we take as a guiding principle to treat all students with equal concern, fairness, care, and dignity.

If an appeal has no merit, the outcome is easily understood: the finding of responsibility stands, as does the sanction. If, however, the appeal has merit, the sometimes confusing concept of remand can come into play.

Lawyers understand "remand" as a shorthand legal expression for what happens in a civil lawsuit when a party prevails on appeal and the matter is sent back to the hearing level to correct the error found on appeal. This concept may confuse anyone whose frame of reference is the criminal law because there is a common public perception that a person found guilty of a crime can be set free if an error occurred in the trial. But of course, as noted previously, the criminal law model is simply irrelevant to student discipline processes and the civil law concept of remand is relevant.

Remand applies in appropriate student discipline processes because the academic community has an overriding interest in arriving at the truth. If a serious error arose in the process, the matter is returned to the hearing panel to reopen the hearing or, in an unusual case, to convene a new hearing. In no event is the matter simply forgotten due to an error in process.

Consider this typical example of how remand applies in the student discipline context. A student found responsible for violating the student code might appeal, stating that a witness present at the hearing would have verified his alibi but the judicial body did not allow the witness to testify. If the appeals board agrees that this occurred and that the exclusion was not reasonable, the board would uphold the appeal and return the matter to the original hearing body. That hearing body would reconvene the hearing with the accused student (and victim student, if any) present and hear the additional witness. After that testimony and any follow-up questioning were completed, the original hearing board would retire to reconsider its original determination of responsibility (and, if necessary, its sanction determination) in light of the new testimony and all the testimony it had already heard. Another round of appeal may follow but, hopefully, all procedural errors will now have been corrected.

It is critical to note that the appeals board should not hear the testimony of the excluded witness and try to judge his credibility against that of all the other witnesses, whom it did not hear. Appeal boards that are not properly educated about their function may want to listen to "just one witness" and to "finish the matter." That, however, would be a mistake. Instead, following the "normal" civil remand process, while slightly more time consuming, is much more likely to result in the facts being judged correctly and to reach a result that all involved in the process can recognize as fair.

Should a student victim be allowed to appeal? "Of course," you might say, if you are recalling that our first touchstone was to allow each student the same quality of fairness, care, concern and dignity. Indeed, a victim student -- just like an accused student – may wish to appeal a sanction as unjust (e.g., too lenient given the acts for which the student was found responsible and sanctions given in prior similar cases) or because the wrong result was reached due to flaws in the process. Indeed, the Model Code follows this logic and allows students found responsible for violating campus rules of conduct and student victims the exact same avenues of appeal. Nevertheless, most student

codes allow appeal only by the student who is accused of wrongdoing, perhaps due to a confused reference to the criminal law. Whether a school allows all students the same avenues of appeal or not, its code of student conduct should state clearly which choice it has made.

Conclusion

Institutions take a giant step in the right direction if they:

- Have easily understood rules of student rights and responsibilities that reflect institutional values;
- Follow those rules;
- And educate their constituencies about the rules, and the rights, responsibilities and values that the rules reflect.

Following these principles will not eliminate student misbehavior or prevent all controversy over student discipline. But using them as a guide will reinforce our efforts to do the right thing with students, minimize confusion over the purpose of student discipline, and minimize the possibility that unnecessary judicial intervention will hinder efforts to create the best possible living/learning environment for students.

Resources

Association for Student Judicial Affairs
P.O. Box 2237
College Station, Texas 77841-2237
(979) 845-5262
asja.tamu.edu

American College Personnel Association
One Dupont Circle, Suite 300
Washington, D.C. 20036
(202) 835-2272
www.acpa.nche.edu

A Legal Guide for Student Affairs Professionals. By W.A. Kaplin and B.A. Lee (1997). San Francisco: Jossy-Bass. Adapted from *The Law of Higher Education* (3rd ed.) by the same authors.

The Administration of Campus Discipline: Student, Organization and Community Issues. By B.G. Patterson and W.L. Kibler (ed.) (1998). Asheville, NC: College Administration Publications.

Harnessing the "Spirit of Insubordination:" A Model Student Disciplinary Code. By E. Stoner and K. Cerminara. 17 J.C.U.L. 89. Email enstoner@rssm.com for the latest version.

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